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No. 94-413

In the Supreme Court of the United States

OCTOBER TERM, 1994

STEPHEN A. KNOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether videotapes that focus on the genitals and pubic areas of minor females may constitute "lascivious exhibition[s] of the genitals or pubic area" under the federal child pornography statute, 18 U.S.C. 2252 (1988 & Supp. V 1993) and 2256(2)(E), when those body parts are covered by clothing.

2. Whether petitioner had the requisite mental state to violate 18 U.S.C. 2252 (1988 & Supp. V 1993).

3. Whether 18 U.S.C. 2256(2)(E) is unconstitutionally vague or overbroad.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Broadrick v. *Oklahoma*, 413 U.S. 601 (1973)	16
Cheek v. *United States*, 498 U.S. 192 (1991)	15
Hamling v. *United States*, 418 U.S. 87 (1974)	15, 16
Miller v. *California*, 413 U.S. 15 (1973)	17
National Organization for Women, Inc. v. *Scheidler*, 114 S. Ct. 798 (1994)	13
New York v. *Ferber*, 458 U.S. 747 (1982)	13, 16, 17
Osborne v. *Ohio*, 495 U.S. 103 (1990)	13, 17
Rodriquez v. *Clark Color Labs.*, 921 F.2d 347 (1st Cir. 1990)	14
Rosen v. *United States*, 161 U.S. 29 (1896)	16
Russello v. *United States*, 464 U.S. 16 (1983)	12
Smith v. *United States*, 113 S. Ct. 2050 (1993)	14
United States v. *Arvin*, 900 F.2d 1385 (9th Cir. 1990), cert. denied, 498 U.S. 1024 (1991)	18
United States v. *Brown*, 862 F.2d 1033 (3d Cir. 1988)	14
United States v. *Cochran*, 17 F.3d 56 (3d Cir. 1994), petition for cert. pending, No. 93-8697	14, 15
United States v. *Dost*, 636 F.2d 828 (S.D. Cal. 1986), aff'd *sub nom. United States* v. *Wiegand*, 812 F.2d 1239 (9th Cir.), cert. denied, 484 U.S. 856 (1987)	5
United States v. *Duncan*, 896 F.2d 271 (7th Cir. 1990)	14
United States v. *Johnson*, 855 F.2d 299 (6th Cir. 1988)	14

Cases—Continued: Page

United States v. *Knox*:
776 F. Supp. 174 (M.D. Pa. 1991) 3, 4, 5, 7
977 F.2d 815 (3d Cir. 1992) 2, 5, 6, 7
113 S. Ct. 2926 (1993) 2, 7
114 S. Ct. 375 (1993) 2, 8
United States v. *Moncini*, 882 F.2d 401 (9th Cir. 1989) 14, 15
United States v. *Nolan*, 818 F.2d 1015 (1st Cir. 1987) 18
United States v. *Osborne*, 935 F.2d 32 (4th Cir. 1991) 14
United States v. *Rubio*, 834 F.2d 442 (5th Cir. 1987) 18
United States v. *United States District Court for Central Dist. of Cal.*, 858 F.2d 534 (9th Cir. 1988) 15
United States v. *Villard*, 885 F.2d 117 (3d Cir. 1989) 18
United States v. *Wiegand*, 812 F.2d 1239 (9th Cir.), cert. denied, 484 U.S. 856 (1987) 5, 12
United States v. *Wolf*, 890 F.2d 241 (10th Cir. 1989) 18
United States v. *X-Citement Video, Inc.*, No. 93-723 (argued Oct. 5, 1994) 14

Constitution and statutes:

U.S. Const. Amend. I 16
Child Protection Act of 1984, Pub. L. No. 82-292, § 5(a)(4), 98 Stat. 205 12
Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978) 12
18 U.S.C. 2251 15
18 U.S.C. 2252 (1988 & Supp. V 1993) 4, 14, 15
18 U.S.C. 2252(a)(2) (1988 & Supp. V 1993) 2
18 U.S.C. 2252(a)(4) (1988 & Supp. V 1993) 2
18 U.S.C. 2256(2)(E) 4, 6, 8, 9, 11, 13, 18

Miscellaneous:

Black's Law Dictionary (6th ed. 1990) 11
130 Cong. Rec. 7196 (1984) 12
Dorland's Illustrated Medical Dictionary (27th ed. 1988) 6

Miscellaneous—Continued: Page

H. Gray, *Gray's Anatomy* (30th ed. 1985) 6
H.R. Rep. No. 696, 95th Cong., 1st Sess. (1977) 12
H.R. Rep. No. 536, 98th Cong., 1st Sess. (1983) 13
S. 1011, 95th Cong., 2d Sess. (1977) 12
S. Rep. No. 438, 95th Cong., 1st Sess. (1977) 12
S. Rep. No. 169, 98th Cong., 1st Sess. (1983) .....
Webster's New International Dictionary (2d ed. 1958) 11
Webster's Third New International Dictionary, Unabridged (1976) 6

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OPINIONS BELOW

The opinion of the court of appeals following remand from this Court (Pet. App. 1-52) is reported at 32 F.3d 733. The previous opinion of the court of appeals is reported at 977 F.2d 815. The opinion of the district court denying petitioner's pretrial motion to dismiss the indictment is reported at 776 F. Supp. 174.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1994. The petition for a writ of certiorari was filed on September 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of knowingly receiving through the mail visual depictions of minors engaged in sexually explicit conduct and knowingly possessing such visual depictions, in violation of 18 U.S.C. 2252(a)(2) and (4) (1988 & Supp V 1993). He was sentenced to concurrent terms of imprisonment of five years on each count. The court of appeals affirmed. *United States* v. *Knox*, 977 F.2d 815 (3d Cir. 1992). This Court granted Knox's petition for a writ of certiorari, 113 S. Ct. 2926 (1993), and, based on the views expressed in the government's brief on the merits, remanded to the court of appeals for reconsideration in light of the government's position. 114 S. Ct. 375 (1993). After additional briefing and argument, the court of appeals again affirmed petitioner's convictions. Pet. App. 1-52.

1. In April 1991, Customs agents obtained a warrant and searched petitioner's apartment. The agents seized numerous videotapes and printed materials, including the three videotapes on which this prosecution is based. The three videotapes, each of which is between one and one-half and two hours long, were compilations petitioner had made from videotapes sold by the Nather Company of Las Vegas. See 977 F.2d at 817. Petitioner had obtained about 15 videos sold by Nather (for approximately $60 each)—with titles such as *Ripe and Tender*, *Young Flashers*, and *Sweet Young Things*—and had copied selected portions onto his own tapes. 11/14/91 Tr. 5, 11, 18, 24.

A catalogue of Nather Company videotapes "featuring teen and pre-teen girls" was also found in petitioner's apartment. It described *Young and Tight*, one of the

videos from which petitioner made his tapes, as "featuring about 20 young beauties, ages 8-14, performing baton twirling, majorette and gymnastics routines, plus our usual panty-flashing shots and tight young butts in short-shorts and bikinis." With respect to *Lollipops*, which is also excerpted on one of petitioner's tapes, the catalogue states that there is "an enchanting scene showing a dark-haired beauty of 11 letting us have a long, slow look up her dress to view her snow-white panties." In addition, *Lollipops* features "scenes of a thirteen year old in a leopard skin bikini with a magnificent ass that she puts on display for you as she walks back and forth slowly and teasingly." According to the Nather catalogue, *Early Adolescence*, which petitioner copied onto one of his own tapes, was made in response "to the many requests we had been receiving for tapes that had almost exclusively candid panty shots." The catalogue advised that "if you like undies on girls between the ages of 8 and 16, we suggest you order this rare tape today." 11/14/91 Tr. 4-5; GX 1. Nather's promotional materials also asserted that its tapes were "completely legal" because there was "no sex or nudity." See *United States* v. *Knox*, 776 F. Supp. 174, 179 (M.D. Pa. 1991).

The Nather tapes consist primarily of repetitious sequences set to background music. The district court described them as follows: "In each vignette the subject of the video would strike various poses which were obviously being directed by someone off-camera. Whenever a particular pose revealed the girl[']s underpants or the area surrounding her genitals, the camera would zoom in on the area. In the course of each vignette, more than a substantial amount of time was spent focusing in on these areas, as well as the girl's buttocks." 776 F. Supp. at 179. Petitioner's videotapes consist largely of

sequences, lasting up to 15 seconds each, during which all that is visible on the screen is the portion of a young girl from her navel to her thigh. The girls are typically wearing bathing suits or leotards, or spreading their legs so that their panties are visible under a short skirt. Some girls are attired in provocative ways that are inappropriate to their age. In *Young Flasher*, for example, a girl is wearing fishnet stockings, boots, and red lingerie, while *Adolescent Dreams* shows a girl in a maid's costume with fishnet stockings.

2. In 18 U.S.C. 2252 (1988 & Supp. V 1993), Congress prohibited the transportation, receipt, distribution, or possession of visual depictions that involve "the use of a minor engaging in sexually explicit conduct." The term "sexually explicit conduct" is defined to include "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. 2256(2)(E). Based on the videotapes seized from his apartment, petitioner was charged with receiving and possessing child pornography, in violation of Section 2252.

Petitioner moved to dismiss the indictment. Petitioner did not dispute that the videotapes were "lascivious." 776 F. Supp. at 180 & n.7. He contended, however, that the Nather tapes did not contain an "exhibition of the genitals or pubic area." *Id.* at 180. The district court noted that "[t]he Nather tapes were fraught with instances of the camera zooming in on the area of the girl's genitals" but acknowledged that "in every instance the girl's genitals were covered." *Ibid.* The court observed, however, that "[s]exually explicit conduct covers exhibitions of the genitals or pubic area." *Ibid.* Concluding that "the pubic area would appear to be the region of the human anatomy in close proximity to the genitals," the court denied the motion to dismiss, explaining that "the area in close proximity to the

genitals, specifically the uppermost portion of the inner thigh area closest to the girl's genitals, was clearly exposed" in most of the videotaped materials. *Ibid.*

A bench trial followed, in which the government argued that petitioner's videotapes constituted "lascivious exhibition[s] of the genitals or pubic area" under the test formulated in *United States* v. *Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff'd *sub nom. United States* v. *Wiegand*, 812 F.2d 1239, 1245 (9th Cir.), cert. denied, 484 U.S. 856 (1987).[1] The district court found petitioner guilty on both counts. Pet. App. 10.

3. The court of appeals affirmed.

a. The court framed the principal question as "whether videotapes that focus on the genitalia and pubic area of minor females constitute an 'exhibition of the genitals or pubic area' under the federal child pornography laws * * * even though these body parts are covered by clothing." 977 F.2d at 817. Initially, the court determined that the district court had erred by concluding that the pubic area includes the upper portion of the

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[1] The court in *Dost* identified the following factors as relevant to the application of the statute:

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
> 2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity;
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
> 4) whether the child is fully or partially clothed, or nude;
> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

636 F. Supp. at 832.

inner thigh. The court explained that "[t]he most widely accepted human anatomy treatises make clear that the pubic area is entirely above the genitals and not below or alongside that portion of the anatomy." *Id.* at 819 (citing H. Gray, *Gray's Anatomy* 90-91 (30th ed. 1985), and *Dorland's Illustrated Medical Dictionary* 1533 (27th ed. 1988)).

The court of appeals rejected, however, petitioner's contention "that the genitals or pubic area must be nclad or nude, and fully exposed to the camera, before an exhibition may occur." 977 F.2d at 820. The court observed that the dictionary definition of "exhibit" is "to present to view," "to show publicly," or to "put on display in order to attract notice." *Ibid.* (quoting *Webster's Third New International Dictionary, Unabridged* 796 (1976)). The visual depictions in petitioner's videotapes, the court found, clearly put the genitals and pubic areas of the young girls "'on display' as the camera focused for prolonged time intervals on close-up views of these body parts." 977 F.2d at 820. In addition, "the obvious purpose and inevitable effect of the videotapes was to 'attract notice' specifically to the genitalia and pubic area." *Ibid.* The court concluded that using the ordinary definition of "the word 'exhibition' leads to the conclusion that nudity is not a prerequisite for the occurrence of an exhibition." *Ibid.*

The court of appeals found support for its interpretation in the legislative history of Section 2256(2)(E). An early draft version of that statutory provision prohibited only nude depictions of children. Congress, however, omitted any reference to nudity in the legislation that was ultimately enacted. 977 F.2d at 820-821. The court of appeals regarded that change as an indication of Congress's intent to "criminalize both

clothed and unclothed visual images of a child's genitalia if they were lewd." *Id.* at 820.

b. The court of appeals held that the statute, so construed, was not unconstitutionally vague or overbroad. The court explained that "[a]lthough our interpretation of an exhibition is expansive, the limiting principle in the statute is the requirement of lasciviousness." 977 F.2d at 823.

c. Finally, the court of appeals rejected petitioner's contention that he lacked the requisite mental state to violate the federal child pornography statute because he had believed Nather's assertion that its tapes were "completely legal." See 776 F. Supp. at 179. The court noted that a defendant charged with possession or receipt of child pornography "simply must be aware of the general nature and character of the material and need not know that the portrayals are illegal." 977 F.2d at 825. In this case, the court concluded, there was no doubt that petitioner was aware of the nature and character of the videotapes in question. Nather's promotional materials claimed that its films featured "girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy," and added that "it's almost like seeing them naked (some say even better)." *Id.* at 818. "[C]hild pornography laws," the court of appeals stated, "would be eviscerated if a pedophile's personal opinion about the legality of sexually explicit videos was transformed into the applicable law." *Id.* at 825.

4. This Court granted Knox's petition for certiorari. 113 S. Ct. 2926 (1993). The United States' brief on the merits argued that a minor's genitals must be either nude or discernible under clothing to constitute an "exhibition" within the meaning of the statute. In accordance with the government's suggestion, this Court vacated the judgment of the court of appeals and

remanded the case for further consideration in light of the position taken by the United States. 114 S. Ct. 375 (1993).

5. Following additional briefing and argument, the court of appeals issued a new opinion, in which it adhered to its interpretation of the statute and affirmed petitioner's convictions. Pet. App. 1-52. The court reiterated its previous holding that Section 2256(2)(E) does not require nudity, explaining that in ordinary usage the phrase "lascivious exhibition" encompasses "a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer." Pet. App. 29. The court also held that an exhibition of the genitals or pubic area does not require visibility or discernibility:

> The genitals and pubic area of the young girls in the Nather tapes were certainly "on display" as the camera focused for prolonged time intervals on close-up views of these body parts through their thin but opaque clothing. Additionally, the obvious purpose and inevitable effect of the videotape was to "attract notice" specifically to the genitalia and pubic area. Applying the plain meaning of the term "lascivious exhibition" leads to the conclusion that nudity or discernibility are not prerequisites for the occurrence of an exhibition within the meaning of the federal child pornography statute.

Pet. App. 30.

In the alternative, the court of appeals held that on the record in this case, it would sustain petitioner's convictions even if the statute required discernibility of genitals under clothing. Pet. App. 30 n.11. The court explained that "[i]n several sequences, the photographer

has focused unnaturally on the genitals of the young girls in close-up shots which reveal the outer contours of the genitals through their tight bathing suits, leotards, or underwear." *Ibid.*

The court of appeals rejected petitioner's contention that Section 2256(2)(E), construed to prohibit non-nude depictions, was unconstitutionally overbroad. Pet. App. 44-46. Noting that "[t]he limiting principle in the statute is the requirement of lasciviousness," *id.* at 45-46, the court explained that "[o]nly a minuscule fraction of all pictures of minor children will be sufficiently sexually suggestive and unnaturally focused on the genitalia to qualify as lascivious." *Id.* at 46. Finally, the court again rejected petitioner's contention that, even if he was aware of the nature of the videotapes, he could not be convicted of "knowingly" possessing the proscribed materials because "he was unaware that the videos were child pornography and believed they were legal to own." *Id.* at 49.

ARGUMENT

Petitioner renews his contentions that the federal child pornography statute requires nudity in order to find a lascivious exhibition of the genitals or public area, that he lacked the mental state necessary to violate the statute, and that the statute as construed by the court of appeals is unconstitutional. Those claims lack merit. In our view, the court of appeals on remand correctly interpreted the statute to cover all lascivious exhibitions of the genitals of children; neither nudity nor discernibility of the genitals through clothing is a required element of the offense. Petitioner, moreover, knew the nature and contents of the materials he possessed, and he therefore satisfied the knowledge element of the statute. Finally, the statute, as construed

by the court of appeals, is neither vague nor overbroad. Because the decision below is correct and does not conflict with the decision of any other court, further review is not warranted.[2]

1. Petitioner contends (Pet. 9-22) that the federal child pornography statute does not apply to lascivious depictions of children whose genitals and pubic areas are covered by clothing. In petitioner's view (Pet. 12), the statute "proscribes only depictions in which genitals or pubic areas are exposed to view, uncovered, or bared to the air." That claim is inconsistent with the text, history, and protective purpose of the federal child pornography statute.

a. In arguing that a "lascivious exhibition of the genitals or pubic area" requires a depiction of nude genitals or the pubic area, petitioner notes (Pet. 12) that one meaning of the word "exhibit" is "to offer or *expose to view*" or "to uncover." The ordinary definition of the word "exhibition," however, is not restricted to that meaning. As the court of appeals pointed out, the word "exhibit" encompasses the meaning "[t]o display; as: a. [t]o present for consideration; set forth * * * b. [t]o

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[2] Petitioner's sole submission with respect to the construction of the phrase "lascivious exhibition of the genitals" is that nudity of the genitals is required. He expressly disavows the view that genitals that are discernible through opaque clothing may constitute an "exhibition." Pet. 13 n.13. We note, however, that even if the statute were construed to require that a minor's genitals be nude or discernible under clothing, it would not assist petitioner. The court of appeals held, in the alternative, that petitioner's tapes contain depictions of minors in which the genitals are discernible. Pet. App. 30 n.11. Our position in this Court is that it is unnecessary to show discernibility under the statute. The court of appeals' alternative holding, however, makes clear that even under a narrower reading of the statute, petitioner would not prevail on the record in this case.

present to view; to show, esp. in order to attract notice to what is interesting or instructive." Pet. App. 26 (quoting *Webster's New International Dictionary* 893 (2d ed. 1958)). Particularly in the phrase "lascivious exhibition," the concept of an exhibition does not require nudity.[3] The sexual implications of certain modes of dress, posture, or movement may readily put the genitals on exhibition in a lascivious manner, without revealing them in a nude display. The depictions contained on petitioner's tapes confirm that point.

As the court of appeals noted, "[t]he genitals and pubic area of the young girls in the Nather tapes were certainly 'on display' as the camera focused for prolonged time intervals on close-up views of these body parts through their thin but opaque clothing." Pet. App. 30. Indeed, the manifest purpose of the videotapes was "to attract notice" specifically to the genitalia and pubic area, *ibid.*, in order to stimulate sexual arousal. An example of this is a scene from *Outrageous Playground* in which a girl wearing a blue miniskirt bends over against a tree and spreads her legs so that the camera can focus on her genital area and white panties. The tapes, in short, contained "lascivious exhibitions" within the meaning of the child pornography statute, because they deliberately draw attention to the genitals of young girls in unnatural and sexually provocative ways.

b. Petitioner errs in suggesting (Pet. 14-18) that the legislative history reveals a clear congressional intent to require nudity in prosecutions brought under Section 2256(2)(E). During the deliberations leading to the

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[3] The term "lascivious" is defined to mean "[t]ending to excite lust; lewd; indecent; obscene; sexual impurity; tending to deprave the morals in respect to sexual relations; licentious." Pet. App. 29, quoting *Black's Law Dictionary* 882 (6th ed. 1990).

enactment of the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978), Congress considered a legislative proposal that would have proscribed depictions of minors engaged in "nudity, which nudity is depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." S. 1011, 95th Cong., 2d Sess. (1977). That language was rejected in favor of the phrase "lewd exhibition of the genitals or pubic area."[4] Petitioner's approach would therefore read into the statute a requirement of "nudity" that was dropped during the drafting process. But "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983).[5]

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[4] Assistant Attorney General Patricia M. Wald, who suggested the use of the phrase "lewd exhibitions of the genitals," observed that "Congress could make clear in the legislative history of the bill what types of nude portrayals of children were intended to be encompassed within this definition." S. Rep. No. 438, 95th Cong., 1st Sess. 28 (1977). See also H.R. Rep. No. 696, 95th Cong., 1st Sess. 21 (1977) (Statement of Deputy Assistant Attorney General John C. Keeney). That statement could be read to imply that only nude depictions should be covered. But neither the Justice Department nor, more significantly, any member of Congress expressly stated that the statute would proscribe only nude depictions.

[5] The word "lascivious" was substituted for "lewd" in a 1984 amendment. Child Protection Act of 1984, Pub. L. No. 98-292, § 5(a)(4), 98 Stat. 205. "Lascivious" and "lewd" are essentially synonymous. *United States* v. *Wiegand*, 812 F.2d at 1243. Congress replaced "lewd" with "lascivious" in 1984, however, because "lewd" had been associated with obscenity, and Congress wanted "to make it clear that an exhibition of a child's genitals does not have to meet the obscenity standard to be unlawful." 130 Cong. Rec. 7196 (1984) (Sen. Specter).

c. The court of appeals' construction of Section 2256(2)(E) is also consistent with the purposes Congress intended the child pornography statute to serve. Depictions such as are involved in this case constitute "a permanent record of the child['s] participation [in the production of sexually oriented material] and the harm to the child [would be] exacerbated by their circulation." *New York* v. *Ferber*, 458 U.S. 747, 759 (1982). Such depictions, moreover, could be used by pedophiles "to seduce other children into sexual activity." *Osborne* v. *Ohio*, 495 U.S. 103, 111 (1990). Those effects—the exploitation and later humiliation of the children induced to perform for pornographic productions—have long been a focus of congressional concern. See S. Rep. No. 169, 98th Cong., 1st Sess. 6-7 (1983); H.R. Rep. No. 536, 98th Cong., 1st Sess. 2-3 (1983). And child pornography may have those effects not only when children are posed in the nude, but also when a child is directed by a person off-camera to strike provocative poses, unnatural for the child's age, while the camera zooms in on the genital and pubic areas. Pet. App. 7-8.

Contrary to petitioner's claim (Pet. 21-22), the rule of lenity does not justify inserting a nudity element into the statute. As the court of appeals correctly explained, the rule of lenity is reserved for those cases in which the statute as written is ambiguous. Pet. App. 43 & n.15; *National Organization for Women, Inc.* v. *Scheidler*, 114 S. Ct. 798, 806 (1994); *Smith* v. *United States*, 113 S. Ct. 2050, 2059-2060 (1993). Here, the statutory text contains no "nudity" requirement, and the legislative history confirms that Congress rejected such an express nudity test. The rule of lenity does not justify reading into a statute a non-textual limitation that Congress plainly discarded.

2. Petitioner contends (Pet. 22-26) that he lacked the mental state necessary to violate Section 2252 because he reasonably believed that his possession of the videotapes was legal. That claim is without merit.

The federal child pornography statute requires proof that a defendant "knowingly" transported or shipped, or "knowingly" received or possessed, visual depictions of a minor engaging in "sexually explicit conduct." 18 U.S.C. 2252 (1988 & Supp. V 1993). The courts of appeals have consistently held that the defendant has knowledge that he is dealing with materials containing visual depictions of sexually explicit conduct when he is shown to know the nature and content of the materials. See *United States* v. *Cochran*, 17 F.3d 56, 60-61 (3d Cir. 1994), petition for cert. pending, No. 93-8697; *United States* v. *Osborne*, 935 F.2d 32, 34 & n.2 (4th Cir. 1991); *Rodriguez* v. *Clark Color Labs.*, 921 F.2d 347, 349 (1st Cir. 1990); *United States* v. *Duncan*, 896 F.2d 271, 277-278 (7th Cir. 1990); *United States* v. *Moncini*, 882 F.2d 401, 404 (9th Cir. 1989); *United States* v. *Brown*, 862 F.2d 1033, 1036-1038 (3d Cir. 1988); *United States* v. *Johnson*, 855 F.2d 299, 306 (6th Cir. 1988).

Under the applicable standard, there can be no question that petitioner "knowingly" possessed the proscribed materials. Petitioner does not contend that he was mistaken—reasonably or otherwise—with respect to the contents of the videotapes.[6] He argues

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[6] In *United States* v. *X-Citement Video, Inc.*, No. 93-723 (argued Oct. 5, 1994), this Court recently heard argument on the question whether Section 2252 requires knowledge of the minority of the performer who is engaged in sexually explicit conduct. Petitioner does not argue that he was unaware that the girls on his videotapes were minors. Any such claim would be meritless, in light of Nather's advertising (which advised, for example, that the videotape featured "undies on girls between the ages of 8 and 16,"

instead that he reasonably believed their possession to be lawful. But "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." *Cheek* v. *United States*, 498 U.S. 192, 199 (1991). This Court has applied that rule to the federal obscenity statutes, *Hamling* v. *United States*, 418 U.S. 87, 123 (1974), and the reasoning of that decision applies equally in the related context of child pornography. See Pet. App. 49-50; see also *United States* v. *Cochran*, 17 F.3d at 59; *United States* v. *Moncini*, 882 F.2d at 405-406. As this Court explained in *Hamling*, it is sufficient that the defendant had knowledge of the nature of the materials; he need not be shown to know that they were illegal.[7]

In light of the explicit descriptions of the materials petitioner ordered, and the findings of both courts below that he was aware of their nature and contents, petitioner "must bear the risk of the potential illegality of his conduct." *United States* v. *Moncini*, 882 F.2d at 405. A contrary rule, this Court has recognized, "would permit the defendant to avoid prosecution by simply

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see 11/14/91 Tr. 4-5; GX 1) and petitioner's own notes on the boxes for the videos (which noted, *inter alia*, that *Ripe and Tender* showed a "10 yr. old in sexy swimsuit poses." 8/28/91 Tr. 46; GX 3.) Nor does petitioner contend that he lacked knowledge of any other fact that bore on the legality of his conduct.

[7] Petitioner relies (Pet. 24) on *United States* v. *United States District Court for Central Dist. of Cal.*, 858 F.2d 534 (9th Cir. 1988), in which the court of appeals held that a defendant charged with the production of child pornography in violation of 18 U.S.C. 2251 was entitled to an affirmative defense based on a reasonable mistake of age. Whatever the merits of its holding, the court of appeals in that case did not recognize a mistake of law defense. Rather, the court held that a defendant who reasonably lacked knowledge of a legally dispositive *fact* was entitled to acquittal on that basis.

claiming that he had not brushed up on the law." *Hamling*, 418 U.S. at 123; see also *Rosen* v. *United States*, 161 U.S. 29, 41-42 (1896).

3. Finally, petitioner contends (Pet. 25-30) that as construed by the Third Circuit the federal child pornography statute is unconstitutionally vague and overbroad.

a. Petitioner does not assert that his own videotapes are constitutionally protected, and they clearly are not. *New York* v. *Ferber*, *supra*. Rather, he relies (Pet. 26-28) on the First Amendment overbreadth doctrine. That doctrine, as the Court noted in *Ferber*, is one of the few exceptions to the traditional principle that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." 458 U.S. at 767. The overbreadth doctrine is "strong medicine" that should be employed "only as a last resort." *Id.* at 769 (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973)).

The federal child pornography statute is not unconstitutionally overbroad. The requirement that an exhibition of a minor's genitals be "lascivious" ensures that the overwhelming majority of depictions covered by the statute have no protection under the First Amendment. If there are any "lascivious exhibition[s]" of a minor's genital and pubic areas that are protected under the Constitution, there certainly cannot be many; typical pictures taken at gymnastic meets or dance performances (Pet. 26-27) would not be found to be "lascivious." As this Court explained in *Ferber*, in upholding New York's child pornography statute, a prohibition of the "lewd exhibition of the genitals" does not violate overbreadth principles, even if it would arguably be impermissible to apply the statute to medical

textbooks or National Geographic photographs. 458 U.S. at 751. Like the New York statute upheld in Ferber, this is "the paradigmatic case of a * * * statute whose legitimate reach dwarfs its arguably impermissible applications," 458 U.S. at 773, and the overbreadth challenge therefore fails.

b. For similar reasons, petitioner's vagueness challenge (Pet. 28-30) also fails. This Court in Ferber rejected virtually the same vagueness claim that petitioner advances. As the Court noted, "[t]he term 'lewd exhibition of the genitals' is not unknown in this area and, indeed, was given in *Miller* [v. *California*, 413 U.S. 15 (1973)] as an example of a permissible regulation." *Ferber*, 458 U.S. at 765; *Osborne* v. *Ohio*, 495 U.S. at 114. The absence of a nudity requirement does not render the statute vague.

Petitioner claims (Pet. 29) that the statute could conceivably be applied to depictions of minors in leotards, bathing suits, and underwear found in newspapers, magazines, clothing catalogues, and art exhibits. The court of appeals made clear, however, that the statute does not reach visual depictions unless they are "lascivious," and "[o]nly a minuscule fraction of all pictures of minor children will be sufficiently sexually suggestive and unnaturally focused on the genitalia to qualify as lascivious." Pet. App. 46. The court also observed that "[e]ven fewer images where a minor's genital area is not fully exposed will constitute lascivious exhibitions since the fact that a child's genital area is covered is a factor militating against a finding of lasciviousness." *Ibid.* In light of those comments and judicial experience in applying the *Dost* factors (see note 1, *supra*), petitioner's

claim (Pet. 29-30) that the statute has an unpredictable and limitless scope is incorrect.[8]

In this case, it should have come as no surprise to petitioner that his tapes would be found to constitute unlawful depictions of minors engaged in sexually explicit activity. Petitioner's sexually suggestive tapes focused unnaturally on the genitals of young girls who were posed in provocative ways and dressed to enhance that effect. "In several sequences, the minor subjects, clad only in very tight leotards, panties, or bathing suits, were shown specifically spreading or extending their legs to make their genital and pubic region entirely visible to the viewer. In some of those poses, the child subject was shown dancing or gyrating in a fashion indicative of adult sexual relations." Pet. App. 33. Petitioner did not dispute that his tapes were lascivious, and he admitted that they were "designed to elicit a sexual response in the viewer." 11/14/91 Tr. 19. The statute gave petitioner fair warning that his tapes depicted "exhibition[s] of the genitals or pubic area[s]" of minors within the meaning of 18 U.S.C. 2256(2)(E).

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[8] Many courts have applied the *Dost* factors, or a close variation, in construing the statute. See *United States* v. *Arvin*, 900 F.2d 1385, 1390-1391 & n.4 (9th Cir. 1990), cert. denied, 498 U.S. 1024 (1991); *United States* v. *Wolf*, 890 F.2d 241, 244-245 (10th Cir. 1989); *United States* v. *Villard*, 885 F.2d 117, 122 (3d Cir. 1989); *United States* v. *Rubio*, 834 F.2d 442, 447-448 (5th Cir. 1987); *United States* v. *Nolan*, 818 F.2d 1015, 1019 n.5 (1st Cir. 1987). Those factors provide consider-able guidance in determining whether a particular visual depiction violates the statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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